

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
BRIEF**

NO. 76-4243

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

PROTE CONTRACTING CORPORATION,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOP RELATIONS BOARD

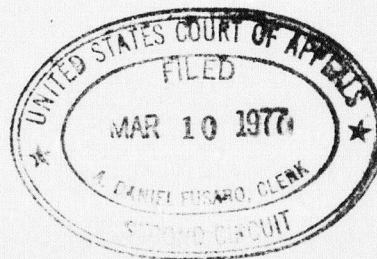
BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company discharged employees Ramon Insua, Ismael Rial, Jose Pepe Gonzales, Felipe Beiro, Jose Gonzales Otero, Juan Pombo and Euripidis Pantzos because of their union activity, in violation of Section 8(a)(3) and (1) of the Act.

STATEMENT OF THE CASE

This case is before the Court upon application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, et seq.),

for enforcement of its order^{1/} issued against Prote Contracting Corporation (herein "the Company") on October 15, 1974, and is reported at 214 NLRB 79. This Court has jurisdiction over this proceeding, the unfair labor practices having occurred within this judicial circuit.

I. THE BOARD'S FINDINGS OF FACT

The Company is a construction contractor and does business on a contractual basis with the school board for Queens County, New York. It performs painting, plastering, tiling, installing windows and the like. Before 1968 the Company performed painting work with its own employees under a contract with District Council No. 9, International Brotherhood of Painters and Allied Trades, AFL-CIO (hereafter the Union); between 1968 and 1972 the Company subcontracted its painting work (A. 28-29; 178, 179).

During the fall of 1973, the Union received information that the Company was using its own employees to perform painting work at two jobsites, P.S. 165 and New Town High School (A. 29; 61-63). Thereafter, Union Business Representative Dennis Blumberg met with Company President Theoclitios Demetriades (called Mr. Prote by his employees) and suggested that the Company sign a contract with the Union. Demetriades declined, saying that he would only be willing to do so if the Union first signed up the other painting contractors (A. 29; 63, 183-184).

^{1/} "A" references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "R." exhibits refer to respondent's exhibits lodged directly with the Court.

In December, 1973, Blumberg had discussions with the Company employees at the New Town High School jobsite, which were aimed at persuading them to join the Union (A. 29; 64, 71). Since most of the employees spoke only Spanish and Blumberg spoke no Spanish, the conversations took place through an interpreter, Alphonso Castro, the Company's foreman at the New Town jobsite (A. 29; 69-70). The employees agreed that they would join the Union.

On January 18, 1974, Blumberg and three other Union organizers returned to the New Town High School jobsite and, with the assistance of Castro and one of the organizers, spoke with the employees about Union benefits and joining the Union. The employees responded that they were interested in joining the Union and were willing to sign authorization cards (which Blumberg had neglected to bring) (A. 29; 72, 75, 160). At noon, President Demetriades entered the jobsite with the payroll. Blumberg greeted Demetriades, told him that the men were willing to sign authorization cards, and suggested that Demetriades sign an agreement. Demetriades responded that he had no more work and would discharge the employees (A. 29; 77-78, 108). Blumberg argued that he knew that the Company had more work from contracts received from the Board of Education. Demetriades reiterated that he had no work and asserted that he would discharge the employees. Thereafter, Blumberg and his fellow organizers got a supply of authorization cards from their office, and met a group of 8 or 9 employees in accordance with a prior arrangement later that afternoon at a bar. All these employees, plus Foreman Castro, signed cards.

On January 21, 1974, the Company wrote to Casual Decor Corporation, proposing that Casual Decor accept a subcontract of the painting and finishing work at the Sarah J. Hale High School Annex for a fee of \$10,500. The Board of Education had awarded this painting and finishing contract work to the Company (A. 31; 168-169).

On January 23, 1974, the Union filed an election petition with the National Labor Relations Board, seeking to represent a unit of painters and helpers. On January 25, 1974, the Company discharged employees Ramon Insua, Ismael Rial, Jose Pepe Gonzales, Felipe Beiro, Jose Gonzales Otero, and Juan Pombo. All these employees had signed authorization cards and had been employed either on the P.S. 165 or the New Town High School projects (A. 30; 150, 161, 169, 182, 186).

Euripidis Pantzos was an employee who had signed a union authorization card but who continued to work on the New Town High School project after January 25, 1974. He thought that his W-2 form showed a lower amount in deductions than had actually been made from his wages. On February 4, 1974, he went to see Demetriades about this apparent mistake (A. 30; 125). When he entered, Demetriades asked him if he were a mafioso. Pantzos asked why Demetriades thought so. Demetriades responded "because the people in the Union are mafiosos. Are you with the Union, too." Pantzos broached the subject of the discrepancy between the amount listed on the W-2 form and the amount actually withheld. Demetriades' response was to give Pantzos a final check and to tell him there was no more work for him (A. 30; 126, 163). At the time of Pantzos' discharge, the Company had a considerable amount of work remaining to be

done on the New Town High School annex (A. 30, 33; 138, 158; R. 5).

II. THE BOARD'S CONCLUSION AND ORDER

The Board, in agreement with the Administrative Law Judge, concluded that the Company violated Section 8(a)(3) and (1) of the Act by discharging employees Insua, Rial, Gonzales, Beiro, Otero, Pombo, and Pantzos because of their union activities.^{2/} The Board's order requires the Company to cease and desist from the unfair labor practices found. Affirmatively, the Board's order requires the Company to reestablish its painting operation, to offer the above-mentioned discriminatees, except for Beiro, reinstatement and backpay, and to post appropriate notices.^{3/}

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS
A WHOLE SUPPORTS THE BOARD'S FINDING
THAT THE COMPANY VIOLATED SECTION 8(a)
(3) AND (1) OF THE ACT BY DISCHARGING
SEVEN EMPLOYEES BECAUSE OF THEIR UNION
ACTIVITIES

It is well established that Section 8(a)(3) and (1) of the Act is violated where the desire to avoid unionization is a factor in the employer's decision to subcontract a portion of its operations and to discharge the employees involved. N.L.R.B. v. Goya Foods, Inc., 303 F. 2d 442, 443 (C.A. 2, 1962), cert. denied, 371 U.S. 911. Accord, N.L.R.B. v. Townhouse T.V. & Appliances, Inc., 531 F. 2d 826 (C.A. 7, 1976). Under the

^{2/} The Board dismissed an allegation that the Company violated Section 8(a)(1) by engaging in coercive interrogation.

^{3/} The General Counsel has indicated that Beiro has been deported to Spain (A. 28;).

applicable legal standards, if the discharges were "even partially motivated by union activity, there is a violation of Section 8(a)(3)." N.L.R.B. v. George J. Roberts & Sons, Inc., 451 F. 2d 941, 945 (C.A. 2, 1971), and cases there cited. We show below that substantial evidence supports the Board's finding that the Company discharged many of its painters and determined to subcontract its painting work because its painting employees sought representation by the Painters' Union.

This Court has long recognized that "the abruptness of a discharge and its timing are persuasive evidence as to motivation." N.L.R.B. v. L.E. Farrell Co., 360 F. 2d 205, 208 (C.A. 2, 1966), quoting from N.L.R.B. v. Montgomery Ward & Co., 242 F. 2d 497, 502 (C.A. 2, 1957), cert. denied, 355 U.S. 829. As shown in the Statement of Facts, the Company discharged most of its painters notwithstanding the considerable work remaining at the New Town project, and proceeded to subcontract the Sarah J. Hale project, both within five days after learning from the Union's business agent that its painters wished the Union to represent them. The Company did not wait to see what demands the Union would make before discharging the painters. Hence, the abrupt nature of the discharges and their timing support the Board's conclusion that the principle reason for the discharges and the subcontracting was the Company's desire to avoid recognizing and dealing with the Union.^{4/}

^{4/} Before the Board, the Company asserted that its intention to subcontract the Sarah J. Hale School project anteceded the advent of the Union and pointed to a letter dated July 18, 1973, from Casual Decor Corp. in which Casual Decor named a price for the performance of a subcontract of this painting work. However, there is nothing in the record to indicate that the Company responded to this communication prior

(continued)

The Board's conclusion that the Company acted to forestall union interference is reinforced by the strong record evidence that the Company was hostile to unionization. When Union Business Agent Blumberg informed Company President Demetriades on January 18, 1974, that the painters supported the Union, Demetriades' immediate reaction was to state his intention to discharge the employees and to claim falsely that there was no more work for them to perform. Not long afterward the Company discharged Insua, Gonzales, Beiro, Otero, Rial, and Pombo, the six painters who supported the Union. Thereafter, on February 4, 1974, Company President Demetriades angrily characterized union supporters as mafioso. This outburst was occasioned by union card signer Pantzos' questioning of the correctness of the amount withheld by the Company for income tax purposes. The Board also concluded that the twin irritations of Pantzos' having joined the Union and his questioning of income tax deductions resulted in his discharge on February 4.

In these circumstances, the Board was amply warranted in concluding that the Company's discharge of the above-mentioned seven painters was motivated by the Company's desire to avoid having to

4/ to its January 21, 1974, letter asking Casual Decor to accept the subcontract at a slightly lower price. This January 21 letter was sent three days after the Union informed the Company of its status as majority representative of the Company's painting employees, and so the Board rejected the Company's contention that a final decision to subcontract was made prior to the Union's appearance. Moreover, although the Company stated its intention at the unfair labor practice hearing to subcontract the three other contracts that it had been awarded (A. 171, 174, 176), the Company had not done so at that time (A. 191-192).

recognize the Union.

CONCLUSION

For the foregoing reasons, it is submitted that a judgment should be entered enforcing the Board's order in full.

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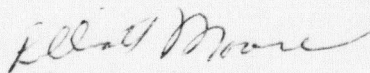
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CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

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Elliott Moore

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Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.

this 18th day of February, 1977.